Supreme Court, U. S.
FILED
AUG 23 1980
MICHAEL RODAK, JR., CL

No. 80-274

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent,

ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the
State of California,
First Appellate District, Division Four

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
THOMAS A. BRADY
Deputy Attorney General
JOHN B. MOY
Deputy Attorney General
Counsel of Record
6000 State Building
San Francisco,
California 94102
Telephone: (415) 557-3380
Attorneys for Petitioner

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

Whether the death penalty special circumstance of California Penal Code section 190.2, subdivision (a)(14)—"[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity . . ."—is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
Question presented	i
Opinion below	1
Jurisdiction	2
Constitutional provision involved	2
Statement of the case	2
A. Proceedings in the state courts	2
B. Statement of facts adduced at the preliminary examinations	4
1. Defendant Engert	4
2. Defendant Gamble	7
Reasons for granting the writ	9
Argument	12
California's death penalty statute which authorizes death or confinement in the state prison for life without possibility of parole for murder which is especially heinous, atrocious, or cruel, is not vague under the due process clause of the Fourteenth Amendment to the United States Constitution	12
A. Procedural differences	14
B. Void for vagueness	18
Conclusion	21

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES CITED

Cases

Page

Furman v. Georgia (1972) 408 U.S. 238 .....10, 13, 17, 21
Godfrey v. Georgia, ... U.S. ..... (1980), 64 L.Ed.2d 398 21
Gregg v. Georgia (1976) 428 U.S. 153 .....10, 20, 21
People v. Anderson (1972) 6 Cal.3d 628 9
People v. Frierson (1979) 25 Cal.3d 142 10
Proffitt v. Florida (1976) 428 U.S. 242 .....4, 10, 13, 14, 16, 17, 19, 20
Spinkellink v. Wainwright (5th Cir. 1978) 578 F.2d 582, cert. den. 440 U.S. 976, reh. den. 441 U.S. 937 20
State v. Dixon (Fla. 1973) 283 So.2d 1 .....12, 19, 20
Witherspoon v. Illinois (1968) 391 U.S. 510 17

Constitutions

California Constitution, Article I, Section 27 10
United States Constitution:
Eighth Amendment 13
Fourteenth Amendment .....i, 2, 10, 12, 13

Rules

California Rules of Court:
Rule 24(a) 2
Rule 28 2
Rules of the Supreme Court of the United States, rule 17.1(c) 11

Table of Authorities Cited

Statutes

	Page
California Code of Civil Procedure, section 1087	3
California Penal Code:	
Section 190.1	15
Section 190.2	15
Section 190.2(a)	12
Section 190.2(a)(14)	i, 2, 3
Section 190.3	16, 17
Section 190.4	18
Section 190.4(a) & (b)	15
Section 190.4(e)	18
Section 1239	18
Fla.Stat.Ann. § 775.082	15
Fla.Stat.Ann. § 782.04(1)(a)	15
28 U.S.C. section 1257(3)	2

Other Authorities

CALJIC No. 8.84.2	17
"Statement of the Vote and Supplement, General Election, November 7, 1978" compiled by March Fong Eu, Secretary of State of California, p. 39	11

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
VS.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SANTA CLARA,
Respondent,
ALLEN LEROY ENGERT and JOHN WAYNE GAMBLE,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the
State of California,
First Appellate District, Division Four

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Four, which may be found at 105 Cal.App.3d 364, 164 Cal.Rptr. 210 (1980), appears as Appendix A to this petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Four, which was entered in this proceeding on May 1, 1980. The Court of Appeal denied petitioner's petition for rehearing on May 29, 1980 (Appendix B), and the decision became final June 30, 1980. (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on June 25, 1980 (Appendix C). The remittitur, due to be issued on July 1, 1980, the sixty-first day after the opinion was filed, was ordered stayed on June 30, 1980 pending petition for writ of certiorari to this court (Appendix D). This petition for writ of certiorari was filed within 60 days of June 25, 1980. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE STATE COURTS

Real parties in interest Allen Leroy Engert and John Wayne Gamble are charged in separate prosecutions with murder and the special circumstance of California Penal Code section 190.2, subdivision (a)(14) is alleged as to each defendant. Defendants in separate pretrial proceed-

ings challenged the special circumstance quoted in footnote 3, p. 12 on the ground it was void for vagueness under the due process clause. Respondent, the Superior Court of Santa Clara County, ruled in each case that the challenged special circumstance is void for vagueness under due process requirements of both the California and Federal Constitutions.

Petitioner, the People of the State of California, petitioned the State Court of Appeal, First Appellate District, for writ of mandate in each case to set aside the judgment on demurrer/motion to strike entered by respondent court. The Court of Appeal, First Appellate District, Division Four, issued alternative writs of mandate (Cal.Code of Civ.Proc. § 1087). By published decision filed May 1, 1980, a two-justice majority concluded respondent court acted properly in granting the demurrer/motion to strike the special circumstance of California Penal Code section 190.2, subdivision (a)(14). The third justice of the Court of Appeal, in a dissenting opinion, concluded that the special circumstance was not unconstitutionally vague.

The People of the State of California petitioned for rehearing on May 15, 1980, but rehearing was denied on May 29, 1980 (Justice Poche was of the opinion rehearing should have been granted) (Appendix B).

A petition for hearing on denial of writ of mandate was timely filed in the California Supreme Court on June 10, 1980. The petition for hearing in the State Supreme Court was denied on June 25, 1980 (Justices Clark and Richardson were of the opinion the petition for hearing should have been granted) (Appendix C).

A petition for stay of issuance of the remittitur and for an order staying the execution and enforcement of the judgment was filed in the First Appellate District Court of Appeal of the State of California, Division Four, on June 27, 1980, and was granted by the Court on June 30, 1980 (Appendix D). The People of the State of California have throughout the state court proceedings maintained that the special circumstance in question is not unconstitutionally vague, primarily relying on *Proffitt v. Florida* 428 U.S. 242 (1976).

B. STATEMENT OF FACTS ADDUCED AT THE PRELIMINARY EXAMINATIONS

1. Defendant Engert

Mr. Orville Wimberly left for work about 5:00 p.m. on May 15, 1979 (PT 52b). When he left the apartment his girlfriend, Adria Manning, was in the bedroom and "[s]he was a little bit intoxicated, but other than that, in reasonably good shape" and alive (PT 52b). She was wearing then a white nightgown with "some design in it" (PT 53b). She smoked in bed and had on occasion burned herself with cigarettes (PT 53b-54b). She had burn marks on her upper torso from falling asleep while smoking (PT 54b).

Wimberly returned home from work about 7:00 a.m. on May 16, 1979. Entering the apartment, he discovered it had been ransacked. He found Adria Manning in the bedroom with a towel and rope around her neck. She appeared dead. Wimberly called the police and emergency squad. He removed the strip of towel and rope from her neck (PT 54b, 63b). Ms. Manning was wearing a nightgown different from the one she was wearing when Wimberly left for work (PT 53b).

San Jose Police Officer Confer was assigned on May 16, 1979 to investigate a homicide at the Wimberly-Manning apartment. The officer lifted a latent fingerprint from a vodka bottle found in the bedroom where decedent Manning was found. Officer Confer also lifted a latent fingerprint from the box for the Kodak instamatic camera which was missing. The latent prints were submitted for comparison (PT 111b-113b) and were determined to be those of defendant Engert (PT 50c-54c).

County Coroner John Hauser performed an autopsy on the body of Adria Manning on May 16, 1979 (PT 4b) and described an injury to the neck as a "band-like mark that almost completely encircled the neck. The marks showed abrasion, that is, a scraping of the skin." Further, "there was a bruising of the tissues of the front of the neck, particularly in the area of the larynx and there was a fracture of the right horn of the hyoid bone." (PT 11b).

The band-like marks encircling the neck were double in some places and there were smaller adjacent marks. There was bleeding into the structures of the larynx. The band-like marks around the neck were consistent with strangulation by some type of ligature, strap or rope being pulled tight around the neck. The doctor emphasized the marks were not consistent with hanging as a fracture of the hyoid bone is not a characteristic injury of hanging (PT 14b-15b). Strangulation by ligature was the cause of death (PT 16b).

There were other injuries; small abrasions on the forehead and the lips. The lips were swollen and scraped. The lip injuries were consistent with the victim's lips having been rubbed against some fabric such as bedclothing.

Impact with a hand or fist against the lips was probably not the cause as no bruising was evident (PT 17b). The lip injury was recent or fresh (PT 18b).

There were fresh bruises to the scalp and forehead of the victim. These were caused by "some sort of bump" (PT 18b). There were five such injuries and so falling was not a likely cause as the victim would have to have fallen five times (PT 19b).

There were a number of burn wounds in various states of healing (PT 19b).

The wrists showed injuries, purplish bruises extending partly around the wrists. Dimensions of the wrist marks were one-quarter inch wide; two were two inches long and another three inches long extending around the wrist (PT 20b). These injuries had a band-like appearance which means they too were produced by ligature (PT 20b).

The next significant injury observed was in the victim's anus. There was blood and bloody material on the surface of the skin around the anus. Examination of the interior disclosed abrasions or scraping in the lining of the mucosa, the lining of the bowel. The lining was also torn. The abrasion extended upward into the interior of the bowel cavity about three inches (PT 21b-22b). Dr. Hauser later analyzed brownish material on the wooden handle of a hammer found on the deceased's bedroom floor (PT 127b). Upon analysis he determined the material on the hammer handle to be "colonic mucosa", the lining of the large bowel (PT 23b). The presence of colonic mucosa on the hammer handle end would be consistent with the hammer handle end having been inserted into the rectum of Adria Manning (PT 23b-

24b). The injury was not consistent with insertion of a penis (PT 25b). The scraping and tear to the bowel lining were caused by a hard or very angular surface. No semenal matter was found inside either the rectum or vagina of the victim (PT 25b).

Dr. Hauser opined that Adria Manning was alive at the time she suffered the neck injury as there was a "vital reaction"—bleeding at the injury sites. There was a "good bit" of bleeding in the neck area. As to the injury to the anus, there was bleeding at this location on Adria Manning's body also. But compared to the neck area, the degree of bleeding in the anal area was less. Due to his observation there was more bleeding in the neck area than the area of the anus, Dr. Hauser concluded the neck injury preceded the anal injury (PT 29b-31b). The bleeding in the anus indicated Adria Manning "wasn't really dead or there wouldn't be any bleeding at all other than what you get by gravity." (PT 31b).

2. Defendant Gamble

On August 9, 1979, Dr. Richard Mason performed an autopsy on the body of Shanean Hall, a 2-year-old black girl (PT 8-9). External examination disclosed three bruises on the forehead (PT 11), a one-quarter inch abrasion on the mid-lower lip (PT 13), and three one-half inch bruises on the left front chest (PT 14). In addition, there were multiple one-eighth to one-half inch bruises in the area of the abdomen (PT 16). Abrasions were present which would be consistent with application of pressure by fingernails (PT 16). The doctor discovered "some needle puncture wounds" in the right groin and a contused area

in the left groin also possibly related to needle puncture wounds (PT 17).

Dr. Mason found no trauma to the child's vagina, but the child's rectum was dilated, stretched, and he found a small amount of fecal matter with blood behind it (PT 17-18). After cleaning the rectal area, the doctor found "an abrasion completely encircling the rectal sphincter with the skin actually rubbed off, and there was a small amount of hemorrhage in the skin." (PT 54.) His examination of the rectum interior disclosed stretch trauma in the rectum behind the sphincter and hemorrhage in the mucosal lining of the interior. The doctor opined that "a large cylindrical object was jammed in there and it scraped the skin and it stretched the inside of the rectum causing hemorrhage in that area." (PT 19.) The diameter of the object inserted had to be greater than an inch and a half and would have been consistent with either a broom handle or a penis (PT 19).

Dissection of the skull disclosed seven separate bruises within the scalp (PT 21-22). Removal of the top of the skull revealed a bilateral subdural hematoma (bleeding between surface of brain and skull) 20 cc. in volume, covering a 2½ square inch area on either side of the brain. He also observed swelling of the brain (PT 23-24). The hemorrhages were caused by the direct application of force to the head (PT 25).

Internal examination of the abdominal cavity revealed 200 c.c. of liquid blood. There was a ¾ x ¾ inch laceration in the middle of the liver at the point of attachment. This wound was inflicted by a blow to the abdomen. Other

organs in the mid-abdomen region had been injured by a forceful blow, i.e., the large bowel or tranverse colon had been crushed and bruised, and loops of the small bowel and pancreas had been bruised (PT 26). The doctor opined that "a forceful blow had been applied to the front of the abdomen pushing these soft tissue organs inwards and smacking them against the backbone" (PT 26). The injuries were consistent with multiple blows (PT 27). These injuries were all recent with fresh hemorrhaging (PT 28-29).

However, Dr. Mason also found evidence of prior injuries to the child. Specifically, "[t]here were two healing fractures involving bones of fingers, one on each hand." (PT 27.) These fractures were natural healing processes, about two weeks old, and had not received medical attention (PT 28).

The doctor's opinion as to the cause of the injuries was that the "[c]hild was beaten to death and something was jammed into her rectum." The abrasions to the torso would be consistent with someone grasping the torso of the child and penetrating the rectum with his penis (PT 30). The cause of death was "[b]lunt trauma to the head and abdomen due to multiple blows to the head and abdomen; contributory cause was abrasions and contusions of the anus and rectum." (PT 31.)

REASONS FOR GRANTING THE WRIT

In 1972, the California Supreme Court ruled the death penalty in California unconstitutional on the ground that it amounted to cruel and unusual punishment. *People v. Anderson* (1972) 6 Cal.3d 628. However, the electorate of the State of California in the November 1972 General Elec-

tion approved an initiative which added Article I, section 27 to the California Constitution which provides:

> "All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. [¶] The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 [of the California Constitution] nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."

The California Supreme Court, in *People v. Frierson* (1979) 25 Cal.3d 142, recognized that the purpose of Article I, section 27 as approved by the voters was to conform the California death penalty law to the demands of the Federal Constitution, as expressed by this Court in *Furman* and *Gregg*, et al.[1] *Id.* at 185. Therefore, if the especially heinous, atrocious or cruel special circumstance does not violate the Federal Constitution, it cannot be invalid under the California Constitution.

The Court of Appeal majority rejected our argument that *Proffitt v. Florida, supra*, establishes the constitutionality under the Due Process Clause of the Fourteenth Amendment of the especially heinous, atrocious, or cruel death penalty standard. This Court in *Proffitt* specifically found the death penalty standard was not vague in the context of its use in the Florida statute. Petitioner urges

---

[1]*Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.

that the use of this death penalty standard in California also serves to provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. Since the Court of Appeal majority has ruled that the language, "especially heinous, atrocious, or cruel" is unconstitutionally vague, it has decided a federal question in conflict with decisions of this Court. See Rule 17.1(c), Rules of the United States Supreme Court.

By overwhelming vote[2] in the general election of November 7, 1978, the People of the State of California expressed their determination that the death penalty be made applicable to murders which are "especially heinous, atrocious, or cruel manifesting exceptional depravity." If the decision of the two-judge State Court of Appeal majority—the unsoundness of which has been convincingly established by the strong dissent of the third judge of the State Court of Appeal panel—is allowed to stand, the will of the People of the State of California to conform the California capital-sentencing procedure to the demands of the Federal Constitution will be irreparably frustrated. Certiorari should be granted so this court can resolve whether the "especially heinous, atrocious, or cruel" death penalty standard as used in California comports with the Federal due process clause.

---

[2]See "Statement of the Vote and Supplement, General Election, November 7, 1978" compiled by March Fong Eu, Secretary of State of California, p. 39.

ARGUMENT

CALIFORNIA'S DEATH PENALTY STATUTE WHICH AUTHORIZES DEATH OR CONFINEMENT IN THE STATE PRISON FOR LIFE WITHOUT POSSIBILITY OF PAROLE FOR MURDER WHICH IS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, IS NOT VAGUE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The death penalty special circumstance ruled constitutionally invalid[3] by respondent Court had its genesis in the Florida capital sentencing statute and the Model Penal Code, upon which the Florida statute was substantially patterned. The drafters of the California statute utilized the Florida Supreme Court's construction of the terms "especially heinous, atrocious, or cruel manifesting exceptional depravity" as meaning "a conscienceless, or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon* (Fla. 1973) 283 So.2d 1, 9. The challenged special circumstance was part of Proposition 7, entitled, "Murder. Penalty—Initiative Statute", adopted by the electorate in the November 7, 1978 general election. The

---

[3]In pertinent part, Penal Code Section 190.2, subdivision (a) provides: "The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under section 190.4, to be true: * * * (14) The murder was especially heinous, atrocious, or cruel manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim."

People of the State of California urged in the state courts and now urge before this Court that California's special circumstance "that the murder was especially heinous, atrocious, or cruel" in the context of the California death penalty statute, is not vague under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeal majority rejected petitioner's argument that *Proffitt v. Florida* (1976) 428 U.S. 242, disposed of the contention raised by defendants that the terms "especially heinous, atrocious or cruel" were vague and overbroad. The majority noted that this Court in *Proffitt v. Florida, supra,* had limited certiorari to the question whether the Florida statute when viewed in its entirety would result in capricious or arbitrary application of the death penalty. The majority was persuaded that this Court in *Proffitt* had considered vagueness only in the context of the Eighth and Fourteenth Amendments, thereby leaving open the broader question whether the language of the special circumstance was void for vagueness under the due process clause. The majority concluded that the "especially heinous, atrocious, or cruel" death penalty standard occupies a significantly different place in California's statutory scheme than it does in Florida's and that it was so vague as used in California that it constituted a denial of due process (App. A, at 7-9). Petitioner submits that although the California capital sentencing statutory scheme differs in certain respects from the Florida statutory scheme, the California capital sentencing scheme is still a valid post-*Furman* approach to imposing capital punishment. The

"especially heinous, atrocious, or cruel" standard, used as a "special circumstance" in California, is not unconstitutionally vague.

A. Procedural Differences

The distinction offered by the Court of Appeal majority is that a defendant accused of a capital crime is somehow at a disadvantage if he faces the "especially heinous, atrocious, or cruel" standard as a special circumstance in California, instead of as an aggravating circumstance as in Florida. The majority stated:

> "In Florida, [especially heinous, atrocious, or cruel] is one of eight aggravating circumstances. The jury is not required to make a finding on the 'especially heinous' factor: it is but one factor it is directed to consider. When the heinousness of a murder is one of several factors to be considered, there is less likelihood that the vagueness will affect the discretion of the trier of fact. In Florida, the jury is not required to choose the penalty in accordance with its finding that the crime was especially heinous. If a defendant is found guilty of a capital offense, an evidentiary hearing is held after which the jury considers whether some of the seven statutory mitigating circumstances in combination outweigh the aggravating circumstances found to exist. The sentencing choice is between death and life imprisonment, which includes the possibility of parole. The jury's decision is only advisory; the actual sentence is imposed by the trial judge." (See *Proffitt v. Florida, supra,* 428 U.S. at pp. 248-249.) (App. A, at 7-8.)

Petitioner urges that a fair comparison of the California and Florida death penalty procedures shows that the Cali-

fornia scheme is not deficient in providing safeguards to a defendant accused of a capital crime. In Florida, all first degree murder constitutes capital felony. Fla.Stat.Ann. § 782.04(1)(a). Once a Florida jury finds a defendant guilty of first degree murder, a separate proceeding is held on the issue whether the accused receives life imprisonment (serving a minimum of 25 years before becoming eligible for parole) or death. Fla.Stat.Ann. § 775.082. In short, under the Florida scheme a verdict of first degree murder alone constitutes capital felony subjecting the defendant to the possibility of a death sentence.

In California, on the other hand, a finding of first degree murder alone is insufficient to authorize the convening of the penalty phase of the trial to determine if the death penalty shall be imposed. California permits a death penalty determination only if one or more special circumstances set out in Cal.Pen. Code § 190.2 have been found true. Cal.Pen.Code § 190.1 (Added by § 4 of Initiative Measure approved November 7, 1978). A finding that a special circumstance is true must be beyond a reasonable doubt and by unanimous verdict. Cal.Pen.Code § 190.4, subdivisions (a) & (b). (Added by § 10 of Initiative Measure approved November 7, 1978).

Petitioner submits that if, as in Florida, a verdict of first degree murder alone provides a sufficient basis for subjecting an accused to an evidentiary hearing to determine if the death penalty shall be imposed, that a procedure which requires a jury to find a special circumstance beyond a reasonable doubt and by unanimous verdict before a death penalty determination hearing may be held, provides no less protection to an accused.

In both Florida and California the jury in the penalty phase of the trial is provided statutory guidelines for the determination whether the defendant shall receive life imprisonment or death. In Florida the jury is directed to consider "'[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' §§ 921.141(2)(b) and (c) (Supp. 1976-1977) [footnote omitted]. The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that '[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' [Citations]." *Proffitt v. Florida, supra,* 428 U.S., at 248-249.

In California the determination of life without possibility of parole or death in the penalty phase of the trial is vested in the jury. The jury is directed to consider the existence of any special circumstance found to be true as well as "the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition." Cal.Pen.Code § 190.3 (Added by § 8 of

Initiative Measure approved November 7, 1978.) In short, the California death penalty sentencing scheme focuses the attention of the jury on the circumstances of the crime and the defendant and, thereby, satisfies the directive of *Furman* for avoiding arbitrarily and capriciously imposed death sentences.

The Court of Appeal majority, however, erroneously opined that the "especially heinous, atrocious, or cruel" aggravating circumstance was constitutionally valid under the Florida scheme because in Florida it is the trial judge which ultimately decides life or death (App. A, at 8). Notwithstanding the fact that under the Florida statute it is the trial judge who ultimately determines the sentence of life or death, it is also constitutionally valid for the jury to carry out this important societal function. *Proffitt v. Florida, supra,* 428 U.S. at 252; *Witherspoon v. Illinois,* 391 U.S. 510, 519 fn.15 (1968). Significantly, a jury in Florida may recommend death by only majority vote; in California, on the other hand, the death penalty may be imposed only if all twelve jurors agree. Cal.Pen. Code § 190.3; See CALJIC No. 8.84.2.

The California statute provides that "the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances . . ., and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." Cal.Pen.Code § 190.3. However, where a jury returns a verdict of death,

> "the defendant shall be deemed to have made an application for modification of such verdict or finding. . . . In ruling on the application, the judge shall review

> the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings." Cal.Pen.Code § 190.4, subd. (e).

Lastly, should the modification of the sentence of death be denied by the trial judge, such denial is reviewed by automatic appeal to the California Supreme Court. Cal. Pen.Code §§ 190.4, 1239. Since the California death penalty procedures provide jury and trial court with specific and detailed guidance for the determination whether to impose the death penalty or life without possibility of parole, and provide meaningful review of the death penalty determination, it is clear, we submit, that California now has a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not.

B. Void for Vagueness

The Court of Appeal majority determined that the words "cruel," "atrocious" and "heinous" were explained by use of terms that were even more uncertain, i.e., "conscienceless" and "pitiless". The majority also found the term "unnecessarily torturous" had no commonly understoood meaning as distinguished from "the infliction of torture." (App. A, at 4.) As petitioner pointed out, *supra,* the drafters of the California death penalty initiative adopted the meaning the Supreme Court of Florida has attached to the standard "especially, heinous, atrocious, or cruel."

State v. Dixon, supra, 283 So.2d, at 9; *Proffitt v. Florida, supra,* 428 U.S., at 255.

The Court of Appeal majority condemned the special circumstance because it was not as specific as language in a penal statute which defines a crime. But the function of a special circumstance is not to define a crime, rather its purpose is to guide the trier of fact in selecting those few cases in which the death penalty is warranted from the many in which it is not. As Justice Poche pointed out in his dissenting opinion,

> "due process commands that a penal statute must be definite enough to provide both a standard of conduct for those whose activities are prescribed and for the ascertainment of guilt. The statute involved here meets that standard. The notice given by the Penal Code is abundantly clear: Do not commit murder in the first degree because if you do you may find yourself subject to death or lifetime behind bars if the killing is accompanied by one or more of the special circumstances set forth in Penal Code § 190.2. What is forbidden is murder. Once a person decides to engage in that clearly defined activity it is difficult to believe that he or she has any real need, much less constitutional right to the same sort of precision with respect to the nature of the special circumstances that will elevate that murder to one that can be so punished. Once a person decides to murder another his choice of methods is not within the ambit of protected activity." (App. A, at 12.)

Justice Poche emphasized that if the due process clause required the same specificity in defining special circumstances as it does in the definition of crime itself, that the

"especially heinous, atrocious, or cruel" special circumstance satisfied such demand for specificity. Justice Poche, in full accord with the Supreme Court of Florida's decision in *State v. Dixon, supra*, concluded that the phrase "a conscienceless or pitiless crime which is unnecessarily torturous to the victim" is self-explanatory, having no different meaning in law than it had in ordinary language. Finally, Justice Poche stressed that the special circumstance under challenge "cannot be made more clear by any other judge-blessed words in the English language except by an all-inclusive listing of specific examples." (App. A, at 3.) Not only has this Court not suggested that a specific listing of particular acts is necessary, but the decision of *Proffitt v. Florida, supra*, runs directly counter to such a suggestion.

In *Proffitt*, this Court concluded that the very death penalty standard under discussion in the instant case was not unconstitutionally vague. *Proffitt v. Florida, supra*, 428 U.S., at 255-256. The specific question of whether the "especially heinous, atrocious, or cruel" death penalty standard is vague under the due process clause, was considered and rejected in *Spinkellink v. Wainwright* (5th Cir. 1978) 578 F.2d 582, 610-612, *cert. den.* 440 U.S. 976, *reh. den* 441 U.S. 937.

Petitioner submits that the special circumstance the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity, [meaning] a conscienceless, or pitiless crime which is unnecessarily torturous to the victim" provides a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia, supra,*

428 U.S., at 188, quoting *Furman v. Georgia, supra,* 408 U.S., at 313 (White, J., concurring); *Godfrey v. Georgia,* ..... U.S. ..... (1980), 64 L.Ed.2d 398, 406.

Finally, we emphasize that any vagueness which could result from the application of the "especially heinous" special circumstance, will be obviated by the state Supreme Court construing the statute to keep it within constitutional bounds. There is no reason to believe that the California Supreme Court will adopt an open-ended construction of the "especially heinous, atrocious, or cruel" special circumstance such that every first-degree murder could be brought within its reach. *Gregg v. Georgia, supra,* 428 U.S., at 201.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 20, 1980

GEORGE DEUKMEJIAN
Attorney General of the State of California
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General—Criminal Division
EDWARD P. O'BRIEN
Assistant Attorney General
THOMAS A. BRADY
Deputy Attorney General
JOHN B. MOY
Deputy Attorney General
Counsel of Record
Attorneys for Petitioner

(Appendices follow)

Appendices

Appendix A

In the Court of Appeal of the State of California
First Appellate District, Division Four

People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, Allen Leroy Engert, Real Party in Interest.	1 Civil No. 48470 (Sup. Ct. No. 72637)
People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, John W. Gamble, Real Party in Interest.	1 Civil No. 48390 (Sup. Ct. No. 73240)

[Filed May 1, 1980]

OPINION

The People seek a determination that respondent court erred when, in two pending murder cases, it struck out of both informations special circumstance allegations which had been pleaded in order to subject the defendants to the death penalty or life imprisonment without possibility of parole.

CERTIFIED FOR PUBLICATION
SEE DISSENTING OPINION

The trial court held to be unconstitutionally vague the provision authorizing a death penalty or life without possibility of parole where "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily tortuous to the victim." (Pen. Code, § 190.2, subd. (a)(14).)

In the trial of a capital case a jury first decides whether the defendant is guilty of murder in the first degree. If the verdict is first degree murder the jury determines whether the offense was attended by one of several special circumstances specified by statute. (Pen. Code, § 190.2.) Some of these special circumstances are quite definite in nature. For example, a special circumstance would exist if the victim was a prosecutor killed in retaliation for performance of his official duties. (Pen. Code, § 190.2., subd. (a)(11).) If a charged special circumstance is found to be true, a penalty of death or life without possibility of parole is mandatory. Subsequently an evidentiary hearing is conducted to enable the jury to consider matters bearing on aggravation and mitigation. The choice of penalty, however, has already been restricted to two possibilities. The effect of mitigating circumstances is limited because mitigating factors are considered only after the jury has narrowed its options by finding the existence of a special circumstance. The judge may reject a jury-imposed death penalty only if he finds that it is "contrary to law or the evidence presented." (Pen. Code, § 190.4., subd. (e).)

A penal statute violates due process requirements if it is so vague that a person of common intelligence must speculate as to its meaning. (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453.) When a statute is attacked for vagueness and uncertainty under the due process clause, there are two facets to the examination. "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed [notice] as well as a standard for the ascertainment of guilt by the courts called upon to apply it [guidance]." (People v. McCaughan (1957) 49 Cal.2d 409, 414.) The language of section 190.2, subdivision (a)(14), does not provide adequate guidance to juries.

The jury must decide on life or death on the basis of a list of epithets which do not by their multiplication more precisely define conduct. As in the attempt to define "lewd or dissolute," the addition of "perjorative adjectives" only heightens the uncertainty. The Supreme Court in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 249, explained:

> "This impressive list of adjectives and phrases confers no clarity upon the terms "lewd" and "dissolute" in section 647, subdivision (a). Indeed, "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than to clarify those terms." (*State v. Kueny* (Iowa 1974) 215 N.W.2d 215, 217 (holding the phrase "open and gross lewdness" unconstitutionally vague).) To instruct the jury that a "lewd or dissolute" act is one which is morally "loose," or "lawless," or "foul" piles additional uncertainty upon the already vague words of the statute. *In short, vague statutory language is not rendered more precise by defining it in terms of syno-*

nyms of equal or greater uncertainty." (Emphasis added.)

Here, the words "cruel," "atrocious" and "heinous" are explained by the use of terms of even more uncertainty, i.e., "conscienceless" and "pitiless." Nor does the use of the word "especially" aid in clarification; it adds another area of uncertainty by requiring a jury to assess the level of cruelty in the "ordinary" first degree murder.

The provision also contains the puzzling term "unnecessarily torturous," which the Attorney General interprets as meaning "the infliction of additional pain beyond that required to kill the victim"—apparently placing on the jury the task of determining what amount of pain it would have "required" to kill the victim. Section 190.2 contains another special circumstance which provides for the additional penalty when "[t]he murder was intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).) If the jury is instructed that torture means the same thing for both special circumstances, the jury must look to a "thesaurus" of "perjorative adjectives" (Pryor, *supra,* 25 Cal.3d at p. 248) to distinguish between the two special circumstances. No commonly understood meaning attaches to the term "unnecessarily torturous" as distinguished from "the infliction of torture." If the jury is unable to find "torture" within the meaning of subdivision (a)(18), then subdivision (a)(14) is an invitation to the jury to register a general feeling of revulsion toward a particular homicide defendant by finding the truth of that special circumstance. The section's vague language permits capricious and arbitrary application by a jury.

In holding unconstitutionally vague a special circumstance which allowed for the death penalty where a " '. . . murder [is] committed by a person . . . who has a substantial history of serious assaultive criminal convictions,' " the Georgia Supreme Court stated: "Whenever a statute leaves too much room for personal whim and subjective decisionmaking without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny. [Citations.] This doctrine has particular application to death penalty statutes after *Furman* v. *Georgia* [(1972) 408 U.S. 238], where, if anything is made clear, it is that a wide latitude of discretion in a jury as to whether or not to impose the death penalty is unconstitutional." (Arnold v. State (1976) 224 S.E.2d 386, 391-392.)

The People argue that a similar provision in the Florida death penalty statutes was upheld by the United States Supreme Court in *Proffitt* v. *Florida* (1976) 428 U.S. 242. In the Florida capital-sentencing system, the jury could consider as aggravated a murder that was " 'especially heinous, atrocious, or cruel' " and the Supreme Court of Florida has construed the statutory process as directed only at " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " (Proffitt v. Florida, *supra,* at p. 255, quoting from State v. Dixon (1973) 283 So.2d 1, 9.) The United States Supreme Court stated: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, at 200-203[]." (*Id.*, at pp. 255-256.)

In Proffitt, however, the Supreme Court specifically noted: "As in Gregg, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See Gregg v. Georgia, ante, at 201 n. 51, []." (*Id.*, at p. 254, fn. 11.) In *Gregg,* the court was considering the definition of murder as "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" when it noted that: "In light of the limited grant of certiorari . . . [w]e review the 'vagueness' and 'overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing capital punishment other than by arbitrariness or caprice." (Gregg v. Georgia (1976) 428 U.S. 153, 201, fn. 51.) Thus the broader question whether the statutory language is too vague to comport with due process was expressly left open.

In *Furman v. Georgia, supra,* 408 U.S. 238, the Supreme Court had held unconstitutional the death penalty provisions before it on the ground that they constituted " 'cruel and unusual' " punishments under the Eighth Amendment, applicable to the states under the Fourteenth Amendment. (*Id.*, at p. 257.) The death penalties were considered cruel and unusual by the *Furman* court because the discretion conferred was "standardless." The problem was not remedied by the mandatory statutes but "simply papered over."

(Woodson v. North Carolina (1976) 428 U.S. 280, 302. The court was still limiting its consideration to the Eighth Amendment argument. The question under consideration in the instant petition is whether the specific provision is so vague and uncertain that a conviction under its standard would constitute a denial of due process.

Not only does the issue before us raise a different constitutional question from that addressed in *Proffitt,* the provision under consideration here occupies a significantly different place in California's statutory scheme than it does in Florida's. In Florida, it is one of eight aggravating circumstances. The jury is not required to make a finding on the "especially heinous" factor: it is but one factor it is directed to consider. When the heinousness of a murder is one of several factor to be considered, there is less likelihood that the vagueness of the standard will affect the discretion of the finder of fact. In Florida, the jury is not required to choose the penalty in accordance with its finding that the crime was especially heinous. If a defendant is found guilty of a capital offense, an evidentiary hearing is held, after which the jury considers whether some of the seven statutory mitigating circumstances in combination outweigh the aggravating circumstances found to exist. The sentencing choice is between death and life imprisonment, which includes the possibility of parole. The jury's decision is only advisory; the actual sentence is determined by the trial judge, (See Proffitt v. Florida, *supra,* 428 U.S. at pp. 248-249.)

In upholding the aggravating circumstance, the Florida Supreme Court, in a case cited in *Proffitt* noted the dangers of letting vague language be the guide for a jury, but

upheld the "especially heinous" language because it felt that an experienced judge would be able to give the language some consistency of application. "To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard [of] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in light of judicial experience." (State v. Dixon, *supra,* 283 So.2d at p. 8.) Georgia's statutory scheme is similar to Florida's; the basic difference is that the jury rather than the trial judge determines the sentence. In California, however, once the jury finds the crime "especially heinous," it must fix the penalty as directed. It must come to grips with the language of the provision because it must make a finding on all charged special circumstances.

Considering the differing contexts in which the provision is found and the different issues before the courts, we conclude that the holding in *Proffitt* is of limited effect in considering the issue whether the "especially heinous" language in Penal Code section 190.2, subdivision (a)(14), is void for vagueness under the due process clause.

The holding in *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Here, that concern is extended to prohibit arbitrary and capricious imposition of either the death penalty or life in prison without the possibility of parole. The focus is not so much on the type of penalty imposed as it is on

the manner in which it is imposed. In *Proffitt* the court held that Florida's similar statutory language provided adequate guidance to the jury during sentencing. However, the court viewed the language in the context of Florida's statutory scheme: as a sentencing factor, to be weighed against other factors in determining a sentence. In California this same language is not a sentencing factor; it is a special circumstance which, if found true, narrows the sentencing choices to two—death or life without possibility of parole. In this context the vague language cannot withstand constitutional scrutiny.

It is concluded that the court acted properly when it struck the special circumstances specified in section 190.2, subdivision (a)(14).

The alternative writs are discharged and the petitions are denied.

Certified for publication.

Christian, J.

I concur:

Rattigan, Acting P. J.

People v. Superior Court (Engert & Gamble)

1 Civil 48470, 48390

I respectfully dissent.

Although I am impressed by the scholarship of my majority brethren in attempting to reconcile the United States Supreme Court opinions they cite, particularly *Furman* and *Gregg*, I am not convinced that subdivision 14 of Penal Code section 190.2(a) is vague, much less that it is unconstitutionally vague. That provision, which is part of an initiative measure approved by the voters in 1978, carries a strong presumption of constitutionality. It must be upheld unless its unconstitutionality "clearly, positively and unmistakably appears." (In re Dennis M. (1969) 70 Cal.2d 444, 453.)

The United States Supreme Court cases cited by the majority do not even touch on the due process attack that is involved here. Perhaps realizing this infirmity, the majority instead place considerable emphasis on the California Supreme Court's decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238. That reliance is puzzling. There it was held that "vague statutory language, resulting in inadequate notice of the reach and limits of the statutory proscription, poses a specially serious problem when the statute concerns speech, for uncertainty concerning its scope may then chill the exercise of protected First Amendment rights." (Id. at p. 251.) The court noted that a list of adjectives uncovered in case annotations to an *obscenity* statute did not render a vague *vagrancy* statute more precise. Such First Amendment concerns are not apposite to murder.

Due process commands that a penal statute must be definite enough to provide both a standard of conduct for those whose activities are proscribed and for the ascertainment of guilt. The statute involved here meets that standard. The notice given by the Penal Code is abundantly clear: do not commit murder in the first degree because if you do you may find yourself subject to death or lifetime behind bars if the killing is accompanied by one or more of the special circumstances set forth in Penal Code section 190.2. What is being forbidden is murder. Once a person decides to enage in that clearly defined activity it is difficult to believe that he or she has any real need, much less constitutional right, to the same sort of precision with respect to the nature of the "special circumstances" that will elevate that murder to one that can be so punished. Once a person decides to murder another his choice of methods is not within the ambit of protected activity. If the statutory description of the special circumstance is less than photo precise, it does not chill that murderer in the exercise of his First Amendment rights. Quite to the contrary, that alleged lack of specificity may serve a very real social good in helping to dissuade the potential killer from either committing the crime or committing it in a way that could be characterized as heinous, atrocious or cruel, manifesting exceptional depravity.

But even if the due process clause requires the same specificity in defining special circumstances as it requires in the definition of the crime itself, that demand has been met. Is there any doubt that a juror or a potential murderer can determine what is meant by "a conscienceless or pitiless crime which is unnecessarily torturous to the vic-

tim"? These terms define themselves. They have no different meaning in law than they have when used in ordinary conversation. The idea intended to be expressed by these words cannot be made more clear by any other judge-blessed words in the English language, except by an all inclusive listing of specific examples.

If such an enumeration is constitutionally required the majority opinion should say so because the Penal Code will require redrafting when this decision becomes final. Instead of the few lines of Penal Code section 190.2(a)(14)

> (i.e., "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim")

we will have a new Penal Code section 190.2(a)(14). Doubtless it will resemble a compendium of methods gleaned from the activities of the Marquis de Sade. Then the person who is thinking of murdering can read through the descriptive listing. Murder by beheading might be mentioned and if it is, supposedly he could decline to carry out his crime in that manner. But if the drafters in a careless moment fail to mention murder by acid bathing then the potential murder would not put himself or herself in jeopardy of either death or lifetime imprisonment if such a method is chosen. If this person then carries out this perversion there is no way under the majority holding that such a person could be put permanently beyond society.

There is some language in the majority opinion that can be read as admitting that the statutory definitions here provide an adequate standard of conduct to the person contemplating crime. That same language, however, indicates that the statute is too vague to provide an adequate standard for the ascertainment of guilt by a jury. If that is what my colleagues mean I find it astonishing: the holding is that the statute provides each juror with a constitutionally precise enough standard by which to guide his conduct (in the event he is contemplating murder by torture) but does not provide that same person with enough in the way of definition to judge the conduct of another person. Apparently the criminals have been provided a non-vague standard but the finders of fact have not been, even though it is the same statute that is vague to one and precise to the other. Penal Code section 190.2, subdivision (a)(14) is, if I understand the majority analysis, a two-way mirror, unlike the looking glass in Alice in Wonderland. When the criminal looks at it he sees the precise definition of a crime but when the non-criminal, the juror, glances at the mirror it is terribly vague, maybe even constitutionally opaque.

It is true, as my colleagues point out, that another special circumstance not under review here (a)(18) requires only an intentional murder involving the "infliction of torture" whereas under (a)(14) what is necessary in the murder is a "pitiless crime which is *unnecessarily* tortuous to the victim." My colleagues suggest that a jury unable to find torture under (a)(18) will be invited by the higher standard of (a)(14) to be "capricious and arbitrary" and to register a general feeling of revulsion toward a particular homicide defendant. That is the equivalent of contending

that a jury unable to find evidence of a lesser included offense will be "invited" by the very existence of the principal crime to vent their prejudice on a defendant so charged.

Each of these cases arises solely from the pleadings—an information and a "demurrer/motion to strike." Neither this court nor the trial court knows the details or even the outlines of the alleged killings. For all we know the defendants were each engaged in the most heinous activity that can be imagined by the demented. When the various trials are completed there is considerable review available ranging from motions for a new trial through automatic, nonwaivable appeal. I have no doubt that the rights of each defendant will be properly protected by such review. If the fear of the majority here is of a runaway jury, that fear should be calmed by knowledge of the innumerable procedural protections available to a defendant in a "special circumstances" case.

Because I harbor reasonable doubt that the unconstitutionality of Penal Code section 190.2(a)(14) "clearly, positively and unmistakably appears," I would set aside the orders striking the special circumstances alleged in each of the informations.

Poché, J.

Appendix B

Court of Appeal of the State of California
In and for the
First Appellate District

Division Four

People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, Allen LeRoy Engert, Real Party in Interest.	No. 48470 Santa Clara Superior Court No. 72637
People of the State of California, Petitioner, vs. Superior Court, Santa Clara County, Respondent, John W. Gamble, Real Party in Interest.	No. 48390 Santa Clara Superior Court No. 73240

[Filed May 29, 1980]

By the Court:

The petition for rehearing is denied.

(Poche, J. is of the opinion that petition should be granted.)

Dated May 29, 1980

Rattigan, J., Acting P. J.

Appendix C

Order Due
June 30, 1980

Order Denying Hearing
After Judgment by the Court of Appeal

1st District, Division 4,

Civil No. 48470
Civil No. 48390

In the Supreme Court of the State of California
In Bank

People, Petitioner

v.

The Superior Court of Santa Clara County, Respondent;
Engert, Real Party In Interest

People, Petitioner

v.

The Superior Court of Santa Clara, County, Respondent;
Gamble, Real Party In Interest

[Filed June 25, 1980]

Petition for hearing denied.

Clark, J., and Richardson, J., are of the opinion that the petition should be granted.

/s/ BIRD

Chief Justice

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 28th day of July, 1980.

By /s/R. C. MATTEOLI

Deputy Clerk

[Seal]

Appendix D

Court of Appeal of the State of California
In and for the
First Appellate District

Division Four

People of the State of California, Petitioner, vs. Superior Court, County of Santa Clara, Respondent. Allen Leroy Engert, Real Party in Interest.	No. 48470 Superior Court No. 72637
People of the State of California, Petitioner, vs. Superior Court, County of Santa Clara, Respondent. John W. Gamble, Real Party in Interest.	No. 48390 Superior Court No. 73240

[Filed June 30, 1980]

By the Court:

The petition by the Attorney General of the State of California for stay of issuance of remittitur and for an order staying the execution and enforcement of the judgment in the above entitled cause to permit the filing of a petition for writ of certiorari in the United States Supreme

Court is granted. It is therefore ordered that the issuance of the remittitur and the execution and enforcement of the judgment be and is hereby stayed until the time for filing such petition has expired, or until the further order of this court. If such a petition for writ of certiorari is timely filed, the issuance of the remittitur and the execution and enforcement of the judgment shall be stayed until the decision thereon by the United States Supreme Court has become final.

Date June 30, 1980

/s/ Rattigan, Acting P.J.